

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NJD:NEW:TL-N-3999-00

RABaxer

date: August 11, 2000

to: Chief, New Jersey Appeals
Attn: Sal Benvenuti - Appeals Team Chief

from: District Counsel, New Jersey District, Newark

subject:

Form 872

Tax Periods: [REDACTED], [REDACTED], and [REDACTED]

This memorandum has been prepared in response to your request for assistance and guidance from our office with respect to the proper caption to be put on a Form 872 for the above taxpayer. The memorandum is based upon the facts outlined below. If the factual statement is incorrect, please notify this office so that we may determine the effect, if any, on the advice rendered.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

ISSUE

What is the proper caption that should appear on a Form 872, Consent to Extend the Time to Assess Tax?

FACTS

The facts as we understand them are as follows:

██████████, EIN ██████████ ("██████") was a New York corporation. It was the wholly owned subsidiary of a Japanese parent corporation. ██████████ was a holding company that was comprised primarily of two subsidiaries, ██████████, EIN ██████████ ("██████") and ██████████, EIN ██████████ ("██████"). For the years at issue, ██████████, ██████████, and ██████████ all three companies filed as part of a consolidated return. In ██████████ ██████████ was spun off from the ██████████ group and became the subsidiary of ██████████, another wholly owned subsidiary of the Japanese parent. ██████████ itself, was merged into it's subsidiary ██████████ a Delaware corporation.

A certificate of Merger and Ownership was filed with the Secretary of State of Delaware on ██████████ indicating that effective ██████████ ██████████ was to be merged into ██████████ pursuant to Section 253 of the General Corporation Law of the State of Delaware ("GCLD"). ██████████ was the surviving corporation after the merger.

The audit of ██████████ commenced sometime in ██████████(?). The first Form 872 was secured for the ██████████ year and was executed on ██████████. The Form 872 was in the name of ██████████ and signed by ██████████, Assistant Treasurer ("██████"). On ██████████ a Form 872 in the name of ██████████ for tax years ██████████, ██████████, and ██████████ was executed by ██████████ (as V.P. Taxation). There are five additional Form 872's for ██████████ executed by ██████████ on ██████████, ██████████, ██████████, and ██████████. These five Form 872s are identical to the one executed on ██████████ with the exception of the date to which the statute of limitations is being extended.

The memorandum sent to us indicates that ██████████ is an officer of ██████████. There is no information provided as to whether or not ██████████ was ever an officer of ██████████.

A 30-day letter has been issued to the taxpayer and the case is currently under consideration by the New Jersey Appeals Office. The protest filed by the taxpayer was on stationary of ██████████. A statutory notice of deficiency has not been issued.

A power of attorney was submitted to the IRS on ██████████ by the taxpayer. The power of attorney was in the name of ██████████ for the years ██████████, ██████████, and ██████████ and was signed by ██████████.

DISCUSSION

In answer to your posed question, the Form 872 in this

matter should have had the following caption:

██████████ (EIN ██████████) successor in interest
(by merger) to ██████████ (EIN ██████████)

The proper official to sign such a Form 872 would be an authorized officer of ██████████.

Since the Form 872s secured in this matter did not have the proper caption, the next issue that must be addressed is whether or not the statute of limitations in this case has been validly extended.

The facts in this case are similar to those in Paramount Warrior, Inc. v. Commissioner, T.C. Memo. 1979-400, affd. without published opinion 608 F.2d 522 (5th Cir. 1979). In that case it was determined that the person signing the Form 872 lacked authority to sign agreements extending the statute of limitations. Under state law, the transferor corporation had ceased to exist after the merger. The Court determined that upon the merger the transferor corporation was so "drowned" into the surviving corporation which became primarily liable for the obligations of the transferor under Nevada law, that no one had any authority to act thereafter on behalf of the transferor with respect to any of the tax liabilities at issue.

The merger of ██████████ into ██████████ took place under Delaware law. The applicable Delaware statutes (8 Del. Code Ann., sec. 253, 259, and 261) are substantially similar to the Nevada law applied in Paramount Warrior and the Court noted that the same result would be reached in that case had Delaware law been under consideration. See, Paramount Warrior, supra, fn.5.

Based upon the Court's analysis in the Paramount Warrior case, ██████████ had no authority to sign an extension of the statute of limitation on behalf of ██████████. As such, the Forms 872 are facially not valid and do not extend the statute of limitations.

The bar of the statute of limitations is an affirmative defense and the party raising it must specifically plead it and carry the burden of proof. Tax Court Rule 142(a); Adler v. Commissioner, 85 T.C. 535 (1985). The party pleading the statute of limitations must establish a prima facie case that the statute has expired. The burden of going forward then shifts to the other side to show that the bar of the statute of limitations is not applicable. Adler v. Commissioner, supra at 540.

There are two methods the Service can use to try and save the statute of limitations in this matter. The first would be the principle of equitable estoppel, the second, reformation of the agreement.

A similar situation occurred in Union Texas International Corp., f/k/a Union Texas Petroleum v. Commissioner, 110 T.C. 321 (1998). Here again Forms 872 were executed in the name of a merged corporation that had ceased to exist. By applying the principles of equitable estoppel the Court held that the taxpayer was estopped from denying the validity of the waivers. The elements of equitable estoppel were stated as follow:

(1) There must be a false representation or wrongful misleading silence by the party against whom the estoppel is claimed; (2) the error must originate in a statement of fact, not in opinion or a statement of law; (3) the party claiming the benefits of the estoppel must have actually and reasonably relied on the acts or statement of the party against whom the estoppel is claimed, and as a consequence of that reliance must be adversely affected by the acts or statements of the one against whom the estoppel is claimed; and (4) the party claiming the benefits of estoppel must not know the true facts.

A detailed analysis of each of these factors is set forth in the Union Texas case and will not be repeated here. (b)(7)a, (b)(5),

(b)(7)a, (b)(5)(AC)

The second remedy, reformation of the agreement, would have to rely on the principles set forth in Woods v. Commissioner, 92 T.C. 776 (1989). In that case the Court determined that if there was a mutual mistake in the written document the court had the authority to reform the agreement to reflect the actual intent of the parties.

The Court could apply this type of remedy in a situation as set forth in this case. See Union Texas International Corporation v. Commissioner, *supra*, fn.8 where the Court indicated that if they were to find that the error in the extension was the result of mutual mistake, rather than any deliberate deception on the taxpayer's part, the Court has the power to reform the written instrument to conform to the agreement and intent of the parties, citing Woods v. Commissioner.

Further support for the reformation of the agreements to conform to the intent of the parties can be found in San Francisco Wesco Polymers, Inc. v. Commissioner, T.C. Memo. 1999-146. In that case, the authorized officer of a dissolved corporation signed statute extensions that had the name of a successor corporation listed on the Form 872. Applying the

principles set forth in Woods v. Commissioner, supra, the Court concluded that the Form 872 was executed with the intent to extend the period of limitations for the dissolved corporation's tax year and reformed the Forms 872 to conform to the intent of the parties.

In our case, [REDACTED] had the authority to extend the statute of limitations for the three pre-merger years of [REDACTED]. The extensions have been signed by [REDACTED], a proper official of [REDACTED]. There is no dispute that the three pre-merger years of [REDACTED] were the subject of the examination. The continued use of the [REDACTED] name on the Forms 872 appears to be the mutual mistake by both parties. The taxpayer also mistakenly used the [REDACTED] name on the power of attorney given to the Service and on the protest letter sent to the Appeals office. There does not appear to be any dispute that the Forms 872 that were signed were intended by both parties to extend the statute of limitations for the three pre-merger years of [REDACTED]. Separate Forms 872 in the name of [REDACTED] have been secured for tax years subsequent to the merger.

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5).

If you have any questions or need further information, please contact Robert A. Baxer at (973) 645-2598.

/s/

PATRICK E. WHELAN
Assistant District Counsel

NOTED:

/s/

MATTHEW MAGNONE
District Counsel